United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7693
76-7023

To be argued by
ROBERT C. OSTERBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

TERRY GILLIAM, GRAHAM CHAPMAN, TERRY JONES, MICHAEL PALIN, JOHN CLEESE and ERIC IDLE, individually and collectively performing as the professional group known as "MONTY PYTHON,"

Plaintiffs-Appellants-Appellees,

against

AMERICAN BROADCASTING COMPANIES, INC.,

Defendant-Appellee-Appellant.

INTERLOCUTORY APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS-APPELLEES

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INTRODUCTION

As in the opening brief of Plaintiffs-Appellants-Appellees, plaintiffs hereinafter will be collectively referred to as "Monty Python;" defendant hereinafter will be referred to as "ABC;" The British Broadcasting Corporation hereinafter will be referred to as "BBC;" and Time-Life Films, Inc. hereinafter will be referred to as "Time-Life."

POINT I

ERRORS IN ABC'S DISCUSSION OF THE RECORD

1. ABC claims that "commercial television standards in the United States ... require editing both for content and for commercial sponsorship," (ABC Brief, 6,7) and that "editing of the ninety minute special was required" (ABC Brief, 13). During the evidentiary hearing, ABC conceded that it was not required to edit the Monty Python programs and caused the editing merely to meet ABC's peculiar internal corporate standards of esthetics, programming convenience and acceptable content (RD 15, Tr. 127-128; 156-157). The broadcast of Monty Python programs by other commercial television broadcasters, without editing and without commercial interruption (74a, 75a, 81a) completely refutes ABC's claim that there is something inherent in the nature of commercial television which required ABC to edit and interrupt.

2. ABC claims that Monty Python's British agent, "surely recognized ... as does anybody having the slightest involvement with American television ... that the uniform practice of American network broadcasting is to have programs sponsored by advertisers and to have commercial messages inserted in such programs," (ABC Brief, 10,11) and that Monty Python also "were well aware that ... deletions of

approximately one-third of their material would be required just for the purpose of accommodating commercials" (ABC Brief, 12). ABC made no attempt to prove the existence of a "uniform practice," or that Monty Python had any knowledge of its existence at the time they contracted with BBC. The testimony of two Monty Python members was directly to the contrary (66a, 67a, 79a). Significantly, the court below refused to take judicial notice that anyone "would necessarily assume that this film had to be edited on ABC when it didn't have to be edited on WNET or, as I understand it, on commercial stations in Las Vegas or Houston" (103a).

3. In referring to the attempts by Monty Python's British agent to obtain the details of the proposed initial broadcast by ABC of Monty Python material, ABC claims that BBC advised the British agent by letter dated September 12, 1975, that "commercial breaks would be made of a length which it was unaware of" (ABC Brief, 7). The letter of BBC actually states that BBC didn't even know if there would be commercial breaks, to wit: "We do not know the situation regarding the length of commercial breaks that ABC intends to make, nor indeed if the programme is receiving sponsorship as opposed to spot advertising" (128a). BBC further stated therein that "ABC have decided to run the programmes 'back to back' and that there is a firm undertaking not to segment them" (ibid.)

4. ABC claims that Monty Python's "English representative confirmed that she was aware, as early as June 9th, that ABC had entered into a deal for telecasting two ninety-minute compilations made up of six Monty Python episodes" (ABC Brief, 10). The record clearly shows the reference of the English representative (125a) was to a proposal made by ABC in June, 1975, to assemble a "ninety-minute compilation of sketches and material to be extracted from approximately thirteen Episodes. [Monty Python] unanimously rejected the proposition" (13a). The ABC "deal" was not entered into until a month later (49a).

POINT II

MONTY PYTHON HAS ESTABLISHED A RIGHT TO A PRELIMINARY INJUNCTION ON EACH OF THE CLAIMS OF COMMON LAW COPYRIGHT INFRINGEMENT, LANHAM ACT VIOLATIONS AND UNFAIR COMPETITION

(A) The Monty Python - BBC Contracts Preclude Any Editing Of The Programs For The Purpose Of United States Television Broadcasts.

All rights to edit Monty Python programs are specified in consummate detail in the scriptwriters' agreements (29a-44a). As ABC concedes, all editing rights acquired by BBC under the express provisions of the scriptwriters' agree-

ments must be exercised before the scripts are recorded (ABC Brief, 17). By expressly limiting BBC's editing rights to the period prior to the recording of the scripts, expressly retaining all rights in their scripts not specifically granted to BBC, and limiting BBC's right to license television transmission of the scripts in "any overseas territory" to the recording of the entire script (29a, 30a, 34a; 37a, 38a, 42a), Monty Python expressly precluded by contract any editing after the recording of the scripts. Furthermore, the limited right to edit granted by Monty Python is a right personal to BBC; it was not granted to ABC or Time-Life, and except for minor alterations, can only be exercised at a "level not below that of Head of Department" of BBC (34a, 35a; 42a, 43a).

McGuire v. United Artists Television Productions, Inc., 254 F.Supp. 270 (S.D. Calif. 1966), relied upon by ABC (ABC Brief, 17), is inapposite because it involved a total absence of any contractual expression of intent. The parties therein negotiated, but failed to agree. The McGuire court did confirm, however, that the existence of a right to edit "is to be determined by agreement between the parties" (id., at 271).

As the court said in Inge v. Twentieth Century-Fox Film Corporation, 143 F.Supp. 294 (S.D.N.Y. 1956), at p. 298:

> "The plaintiff Inge, of course, had a right to license his copyright for moving picture and other purposes.... Any limitations or conditions which the parties see fit to insert will be binding and may be enforced except where they are contrary to public policy or in violation of law. Buck v. Hillsgrove Country Club, Inc., D.C.R.I., 1937, 17 F.Supp. 643; Manners v. Morosco, 252 U.S. 317, 40 S.Ct. 335, 64 L.Ed. 590; Underhill v. Schenck, 238 N.Y. 7, 143 N.E. 773, 33 A.L.R. 303."

Under the performers' agreements, BBC also is limited to the right to license the entire recording (ABC Brief, 21). Nevertheless, Monty Python's performers' agreements are totally irrelevant to the right to use the scripts, and do not grant BBC any rights therein. The performers' agreements were entered into almost a month before the scriptwriters' agreements (ABC App. A3; 36a; 44a). If the performers' agreements had granted BBC the right to use Monty Python's scripts as ABC argues, there would have been no need for the scriptwriters' agreements (Rossiter v. Vogel, 134 F.2d 908, 911 (2 Cir. 1943)). ABC fails to recognize that,under the performers' agreements, any right to materials supplied by the performers is expressly limited to the extent "otherwise agreed by the BBC." (ABC Brief, 21; ABC App. A7) The terms of the scriptwriters' agreements entered into by BBC with Monty Python after the performers' agreements, express precisely the "extent otherwise agreed by the BBC."

That the performers' agreements do not comprehend the scripts is further evident from paragraph 14(e) of the performers' agreements which do not obligate BBC to pay for such program material thereunder (Ds. Ex. A, ¶ 14, erroneously reproduced with omissions in ABC App. A8). The subsequent scriptwriters' agreements provide for specified payments to Monty Python, evidence that BBC knew the performers' agreements did not comprehend the scripts. Consistent therewith, it was established at the hearing that the scriptwriters' agreements are the sole agreements comprehending the scripts (61a).

The court below recognized that the performers' agreements are irrelevant (71a), sustained Monty Python's objection to ABC's request for production of a copy (86a, 87a), and eventually admitted a copy in evidence only to avoid holding up the hearing, commenting "I don't think it has anything to do with the case" (89a, 90a). This court previously has recognized that an agreement granting performers' rights is not an agreement granting rights in copyrighted material used by the performers.

Beechwood Music Corp. v. Vee Jay Records, Inc., 226 F.Supp.8, 14 (S.D.N.Y. 1964), aff'd 328 F.2d 728 (2 Cir. 1964).

ABC's claim that "the power to license in the United States would be utterly meaningless without the right to edit

to conform the recording to American commercial television practices," (ABC Brief, 21, 22) is completely refuted by (a) the broadcasts of Monty Python programs recorded by BBC, without cuts and without commercial interruption, on American commercial television stations (67a, 79a); and (b) the broadcasts of Monty Python programs recorded by BBC, without cuts and without interruptions, on numerous American public broadcasting stations, which operate under the same standards and procedures as commercial stations (RD 15, Tr. 127).

(B) <u>There Was No Reason For Monty Python To Expect ABC To Edit Their Programs</u>.

There is no rational basis for ABC's claim that Monty Python "fully recognized both the necessity of ... editing and [ABC's] right to do it ..." (ABC Brief, 22) ABC never consulted with Monty Python to discuss its proposed editing (RD 15, Tr. 179). After ABC made its heavy cuts, it did not advise Monty Python of the cuts ABC made. (id.)

ABC undertook to heavily cut the Monty Python programs merely to meet its corporate standards and programming convenience (RD 15, Tr. 127, 128; 156, 157). Bob Shanks, an ABC vice-president, testified "most of the changes or cuts were there in order to conform to the format" of 66

minutes of actual program time in a 90 minute time slot (RD 15, Tr. 158). ABC could have broadcast the recorded programs in their entirety at the scheduled broadcast time merely by adjusting its schedule and paying an additional fee to its network affiliates (RD 15, Tr. 122-24; 180-83). There was no necessity for any editing by ABC. All of the heavy cuts imposed by ABC were made because ABC voluntarily made them.

At the time Monty Python entered into the script-writers' agreements with BBC, BBC did not discuss any peculiar standards for United States television broadcasting, and Monty Python were not aware of any (RD 15, Tr. 74, 75).

BBC approved the entire contents of the scripts, recorded the scripts as part of the programs, and broadcast the recorded scripts in their entirety before they were made available to ABC (11a, 85). Other Monty Python programs, similar in content and including the "offensive, unique Python elements," were broadcast by United States commercial television stations without any cuts or interruptions of any kind (81a, 79). Whatever commercials were used were broadcast either at the beginning or at the end of the programs (75a). Similarly, public broadcasting stations, reaching approximately 133 cities and operating "under the same general statutory and regulatory provisions" as ABC,

broadcast Monty Python programs, including the "offensive, unique Python elements" without any cuts whatsoever (55a; RD 15, Tr. 127). In sum, the entire Monty Python experience was that editing for United States television was neither required nor permitted without Monty Python's consent.

As the court below said in rejecting ABC's request for it to take judicial notice when "people in London ... are doing business with United States networks, they too are presumed to know that when it is used for television it has to be edited ..." (103a):

> "THE COURT: I really don't think that I can take judicial notice of the fact that the BBC or anybody else would necessarily assume that this film had to be edited on ABC when it didn't have to be edited on WNET or, as I understand it, on commercial stations in Las Vegas or Houston." (103a)

ABC's reliance on Preminger v. Columbia Pictures Corporation, 49 Misc. 2d 363 (S.Ct. N.Y. Cty. 1966), aff'd memo 25 A.D. 2d 830 (1 Dept. 1966), aff'd memo 18 N.Y. 2d 659 (1966), to support its alleged right to make its heavy cuts is totally misplaced. The Preminger case actually supports Monty Python because the court specifically recognized the right to enjoin the making of heavy cuts even in the

absence of an express contractual prohibition. As the Supreme Court of the State of New York said therein, at p. 372:

> "Obviously such cuts would not be minor and indeed could well be described as mutilation. Should such 'mutilation' occur in the future, plaintiffs may make application to this court for injunctive or other relief against such violation as they may be advised. (Autry v. Republic Prods., 213 F.2d 667, 669; ['We can conceive that some such cutting and editing could result in emasculating the motion pictures so they would no longer contain substantially the same motion and dynamic and dramatic qualities which it was the purpose of the artist * * * to produce'];
> Granz v. Harris, 198 F. 2d 585, supra.)"

To the extent that the Preminger case permitted the making of minor cuts, it is of no assistance to ABC herein. Unlike Monty Python, Preminger failed to adduce any proof therein that the cutting would "interfere with the picture's story line" (49 Misc. 2d 368). Unlike Monty Python, Preminger was aware that there was a practice in the television industry to interrupt the showing of theatrical motion pictures for commercial inserts and to make minor cuts (ibid., at 369). Unlike Monty Python, Preminger failed to alter the industry practice in his agreement, although he had made such specific provisions in other agreements. (id.) Unlike Monty Python, in the Preminger case the evidence showed

that every television station insisted upon the right to interrupt a broadcast of a theatrical motion picture for commercial inserts. (ibid.) The court below appropriately disregarded ABC's reliance on the Preminger case for the additional reason that in the Preminger case a theatrical motion picture was being licensed for television. The court below found it reasonable to assume "you are going to have to do something to be able to produce it on television, whereas the material that we are dealing with here, of course, was produced for television and it is considerably less reasonable to assume that there would be further editing" (101a, 102a).

(C) A License to Broadcast Recorded Scripts is Not a License to Broadcast a Mutilated Version.

ABC claims there is no unfair competition or violation of the Lanham Act because Monty Python consented to "the broadcasting of the recordings" (ABC Brief, 26). The gravamen of Monty Python's claims, however, is that ABC did not broadcast the "recordings." ABC's heavily cut versions of the "recordings" no longer contained the essence of Monty Python, but was turned into mere "pap," rendered "neuter" and "bland." As Michael Palin succinctly stated, it became "something which is really ABC's work, not our work ..." (74a) Nevertheless, ABC broadcast its versions as the Monty Python Show.

There is no evidence in the record that ABC "prefaced its broadcast of December 26 with the legend 'Edited for television by ABC'", or that future rebroadcasts "will bear the same prefatory statement", or whether any such legend was or will be used in a manner designed to effectively communicate this message (ABC Brief, 26). No explanation of any kind was made in conjunction with the October, 1975 broadcast. In any event, the legend referred to does not avoid the deception, regardless of how it was, or could be, utilized. What ABC received had been edited for television by BBC when the scripts were being recorded. To truthfully describe the ABC specials, ABC would have to advise the public, inter alia, that it heavily cut the recorded scripts of Monty Python for the programming convenience of ABC and to meet its corporate standards of esthetics and acceptable content, all without the consent or approval of Monty Python. Furthermore, a mere token "preface" to the broadcast is woefully inadequate to erase the contrary impression created by widespread advertising and publicity. ABC cannot escape a violation of Section 43(a) of the Lanham Act in the absence of a truthful description of its "specials." (Geisel v. Poynter Products, Inc., 295 F.Supp. 331, 353 (S.D.N.Y. 1968), cited and relied upon by ABC (ABC Brief, 26); Noone v. Banner Talent Associates, Inc., 398 F.Supp. 260, 263 (S.D.N.Y. 1975)).

The unfair competition results from the mutilation of the work. ABC does not deny that the results of its heavy cuts was a mutilation of Monty Python's recorded scripts and artistic performances. ABC merely seeks to justify its conduct by claiming a contractual right to edit. Even if such a contractual right existed, as a matter of law it would not excuse a mutilation of the artistic product (Monty Python Opening Brief, Point II, pp. 26-29).

(D) Any Rights ABC Has in the Recordings of the Scripts is Subject to the Extent of the Right to Use the Copyrighted Scripts Therein.

It is unclear what ABC means when it states that Section 7 of the Copyright Law (17 U.S.C. § 7) creates "a new copyright rule (sic) interest in the derivative work such that the proprietor of the derivative work may continue indefinitely to use the material from the underlying work as contained in the derivative work." (ABC Brief, 29) If ABC is claiming that the creator of a derivative work, merely by the act of obtaining a copyright in the derivative work, frees itself of the express limitations contained in the license to use the underlying work, its claim is devoid of legal support. (Monty Python Opening Brief, Point I, pp. 22-25; Ilyin v. Avon Publications, Inc., 144 F.Supp. 368, 372 (S.D.N.Y. 1956),

cited and relied upon by ABC (ABC Brief, 29); Davis v. DuPont de Nemours & Co., 240 F.Supp. 612, 620-21 (S.D. N.Y. 1965)).

As the court said in Grove Press, Inc. v. Greenleaf Publishing Co., 247 F.Supp. 518 (S.D.N.Y. 1965), at p. 527:

> "If the derivative, such as the new matter in a play or the new matter added by different mediums of thought conveyance or communication represented by translation, cannot be used without copying part or all of the copyrighted underlying work, then the consent of the proprietor of that copyright must be obtained."

ABC's further claim that Monty Python "ratified the BBC's right to use less than the entire recordings ..." is without support in law or fact, as shown by ABC's inability to cite any supporting authority (ABC Brief, 29, 30).

For the first time on this appeal, ABC claims that recordings of the scripts are not "composite works", but "joint works" (ABC Brief, 30, 31) In the court below, ABC uniformly denied that Monty Python has any interest therein. All derivative works necessarily must be produced with the consent of the copyright proprietor of the underlying work. If granting such consent resulted in creating a joint work with the author of the derivative work, Sections 1(b),

1(d) and 7 (17 U.S.C. §§ 1(b), 1(d) and 7) would all be written out of the Copyright Law, and there would be no such thing as a composite work. See, Nimmer, Copyright, § 73.2 (1971 Rev.), at pp. 280-82; G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469, 471 (2 Cir. 1951), cert. den. 342 U.S. 849 (1951). ABC's additional suggestion that the copyright in the recordings of the scripts is simultaneously a "joint" copyright and an "independent" copyright (ABC Brief, 31) is an impossibility under all recognized copyright principles.

POINT III

NEITHER BBC NOR TIME-LIFE ARE INDISPENSABLE PARTIES AND ABC SHOULD NOT BE PERMITTED TO TAKE ADVANTAGE OF ITS REFUSAL TO JOIN THEM AS THIRD-PARTY DEFENDANTS

In an infringement action, all infringers are jointly and severally liable and a copyright proprietor may sue such infringers as he chooses.

In 3A Moore's Federal Practice, ¶ 19.14 [2.-4], at pp. 2413, 2414, the general rule is stated as follows:

> "The procedural question of who may and must be joined as defendants in an action for infringement is, as in other tort cases, relatively simple. As Judge Taft stated: 'An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, either

> by actual participation therein or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted.' It would follow that the plaintiff need sue only such participants for a specific tort of patent, copyright, or trade-mark infringement as he sees fit."

In Screen Gems-Columbia Music, Inc. v. Mellis & Lebow Corp., 453 F.2d 552 (2 Cir. 1972), this court said at p. 554:

> "Copyright infringement is in the nature of a tort, for which all who participate in the infringement are jointly and severally liable. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); Ted Browne Music Co. v. Fowler, 290 F. 751, 754 (2d Cir. 1923)."

Celestial Arts, Inc. v. Neyler Color-Lith Co., 339 F.Supp. 1018 (E.D. Wis. 1971). at p. 1019.

Accord: Bevan v. Columbia Broadcasting System, Inc., 293 F.Supp. 1366, 1368 (S.D.N.Y. 1968).

The same principles as to liability are applicable to the unfair competition claim (4 Callman, Unfair Competition Trademarks and Monopolies (3 ed.), § 87.2(a) at p. 97; Andrew Jergens Co. v. Bonded Products Corp., 21 F. 2d 419 (2 Cir. 1927)).

First Financial Marketing Services Group, Inc. v. Field Promotions, Inc., 286 F.Supp. 295 (S.D.N.Y. 1968), relied upon by ABC is inapposite (ABC Brief, 33). It involved the right of a licensee seeking to enforce its licensor's copyright

(at p. 298). Monty Python does not rely upon another's copyright herein. Neither Time-Life nor BBC have an ownership interest in the copyrights in the scripts relied upon by Monty Python herein.

ABC ignored the suggestion of the court below that ABC join BBC and Time-Life as third-party defendants (52a). ABC never made a motion to dismiss and has made no showing that BBC, a British corporation, can be made an additional defendant without depriving the court of its diversity jurisdiction over the first claim of common law copyright infringement (2a-4a).

If ABC requires additional parties herein to preserve its rights of indemnification, its proper remedy is to join them as third-party defendants (Balcoff v. Teagarden, 36 F.Supp. 225 (S.D.N.Y. 1940)). ABC should not be permitted to use its inaction and disregard of available procedures to avoid appropriate injunctive relief.

The court below rejected ABC's claim of lack of indispensable parties, inter alia, in reliance upon Jaeger v. American International Pictures, Inc., 330 F.Supp. 274 (S.D.N.Y. 1971), wherein the court said at p. 279:

> "Finally, it is argued that each cause of action 'centers around Conti Film, and the rights of parties flow from various contracts made with Conti Film.' But plaintiff is not pleading a contract cause of action; he is pleading

a variety of tort, an extracontractual right of authors and directors. This is separable from whatever claims Conti might have against defendant; thus there is no need that Conti be joined. 3A Moore, Federal Practice ¶19.10 at 2345."

POINT IV

THERE WAS NO INEXCUSABLE DELAY AND NO LACHES

Monty Python did not see the first mutilation broadcast by ABC on October 3, 1975, until late November, 1975 (16a). Monty Python did not see the second mutilation eventually broadcast by ABC on December 26, 1975, until after this action was commenced (RD 15, Tr. 53). Monty Python was advised in October, 1975, by a representative of ABC that the second broadcast would not be scheduled until "early 1976" (RD 15, Tr. 31). Monty Python sought details from ABC with respect to the content of the second broadcast promptly following their viewing of the first mutilation, but ABC declined to supply the details. ABC's vice-president considered it a problem of Time-Life (RD 15, Tr. 159). Prior to the commencement of this action, ABC was content to sit tight and ignore Monty Python's claims.

The time Monty Python spent in discovering the facts with respect to their claims does not constitute an undue delay. (Meredith Corp. v. Harper & Row Publishers, Inc., 378 F.Supp. 686, 690 (S.D.N.Y. 1974), aff'd memo. 500 F.2d

1221 (2 Cir. 1974).)

Laches is an equitable doctrine which requires a showing of prejudice resulting from an undue delay. Not only did ABC fail to show undue delay, it failed to show prejudice resulting therefrom. ABC's argument is that the acts complained of are authorized under its July, 1975 agreement with Time-Life. Nothing done by ABC since July, 1975, is even claimed to be based upon inaction of Monty Python. Without prejudice resulting from a delay, there can be no laches. (Emle Industries, Inc. v. Patentex, Inc., 478 F.2d, 562, 574 (2 Cir. 1973).)

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed and the cause remanded with instructions to enter an injunction as prayed for in the application of Monty Python.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York
That on April 9, 1976, he served 3 copies of Reply Brief of Plaintiffs-Appellants-Appellees on

Pyror, Cashman & Sherman, Esqs.,
Attorneys for Defendant-Appellee-Appellant
410 Park Avenue
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

...Juan Delgado....

Sworn to before me this
9th day of April, 19 76

John V Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932550
Qualified in Nassau County
Commission Expires March 30, 1977